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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT C. BICHAN,

Petitioner,

vs.

CHEMETRON CORPORATION, a corporation; ALLEGHENY LUDLUM INDUSTRIES, INC., a corporation; AIRCO INDUSTRIAL GAS, a division of AIRCO, INC., a corporation; AIR PRODUCTS & CHEMICALS, INC., a corporation; LIQUID AIR CORPORATION OF NORTH AMERICA, a corporation; LIQUID AIR, INC., a corporation; and LINDE DIVISION, a division of UNION CARBIDE CORPORATION, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether a corporate officer has standing to bring an action against his employer and his employer's co-conspirators under Section 4 of the Clayton Act (15 U.S.C. §15), where his employment is terminated and he is blacklisted in retaliation for his initiation of competitive business practices and his refusal to participate in antitrust violations.

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OPINIONS IN THE COURT BELOW

The opinion was filed by the United States Court of Appeals for the Seventh Circuit on June 25, 1982 and is reported at 681 F.2d 514. The trial court memorandum opinion and order were entered on August 31, 1981, and are not reported.

The appellate opinion is contained in the Appendix at 1a-12a, and the trial court memorandum and order are in the Appendix at 13a-32a.

JURISDICTION

The judgment sought to be reviewed was entered June 25, 1982. The opinion noted that it was circulated to all judges of the court below pursuant to Circuit Rule 16 because it created a conflict between circuits, and none voted to hear the matter *en banc*. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

TITLE 15 U.S.C. § 1 (Sherman Act)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

TITLE 15 U.S.C. § 15 (Clayton Act)

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant re-

sides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The Amended Complaint was filed in the District Court pursuant to 28 U.S.C. §1337. The facts in this case are derived from the Amended Complaint and an affidavit filed in the trial court.

Plaintiff Robert Bichan was hired in 1976 as president of defendant Chemetron Corporation's industrial gas division. Chemetron and the other defendants sold industrial gases in interstate commerce. During that period, defendants agreed among themselves to fix gas prices, to impose conditions of sale on their customers and to allocate customers. They also agreed not to compete for the historical customers traditionally tied to each defendant. Bids to other defendants' historical customers were always made at or slightly above the prevailing market price.

Plaintiff established marketing, market research and pricing departments at Chemetron. He also pursued competitive negotiations with customers of the other defendants. Plaintiff offered to sell gas to these historical customers of other defendants at reduced prices, contrary to the prevailing practice. His efforts resulted in the transfer of one of the defendant's historical accounts to Chemetron. He attempted to end Chemetron's participation in the price-fixing scheme.

As a consequence of those activities of plaintiff, Chemetron terminated his employment on July 6, 1976. He lost his salary, and also lost certain bonuses which were to be paid to him based upon the sales of Chemetron and the increased profits of his division. Defendants, to carry out and enforce their anticompetitive practices, refused to hire Mr. Bichan and blacklisted him.

Mr. Bichan filed suit under the Clayton Act (15 U.S.C. §15), alleging violation of the Sherman Act (15 U.S.C. §1). The District Court granted the motion of defendants to dismiss the Amended Complaint. That decision was affirmed by the Seventh Circuit Court of Appeals, and this petition ensued.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari in this case because the holding of the court below is in direct and irreconcilable conflict with the opinion of the United States Court of Appeals for the Ninth Circuit in *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F.2d 1387 (9th Cir. 1982). The court in *Ostrofe* held that a sales manager, forced to resign because he refused to participate in antitrust violations, did have standing to bring an action under Section 4 of the Clayton Act (15 U.S.C. § 15). The United States Court of Appeals for the Seventh Circuit in the instant case held that a sales executive, terminated and black-listed for the same reasons, did not have such standing because he was not in the target area and had not suffered an antitrust injury.

The Seventh Circuit opinion noted the conflict on its cover page, reciting that "Pursuant to Circuit Rule 16, this opinion had been circulated among all judges of this court in regular active service because it creates a conflict between the Seventh and Ninth Circuits". That Court also noted (*Bichan v. Chemetron Corporation*, 681 F.2d 514, 518 (7th Cir. 1982)) that the sales manager in *Ostrofe* was in a situation very similar to that of Mr. Bichan. The conflict can be resolved only through decision of this Court. Rule 17.1(a) of this Court specifically provides for such resolution.

It may also be pertinent to note that a petition for a writ of certiorari is before this Court in the *Ostrofe* case, in *H.S. Crocker Company, Inc. v. Frank J. Ostrofe*, No. 82-174.

The conflict between the Ninth and Seventh Circuits is a substantive one arising from contrary philosophies. The Ninth Circuit gives primary consideration, utilizing its balancing test, to whether a grant of standing would further the enforcement purpose of Section 4 of the Clayton Act. *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F.2d 1378, 1383 (9th Cir. 1982). It cited *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 88 S. Ct. 198 (1968) for the proposition that the threat of private action is the bulwark of antitrust enforcement. Of particular merit was the reasoning that only an insider would have the knowledge necessary to expose the covert action. Discharge of law-abiding employees is essential to implementation of the anticompetitive scheme, and protection of that employee's rights under the Clayton Act thus becomes of equal importance to enforcement of the Sherman Act.

The Seventh Circuit has adopted a contrary position on the standing issue in that it does not focus on the purpose of the Clayton Act. Instead, that Court utilized

a more restrictive target area test, finding that Mr. Bichan was not the primary target of the anticompetitive agreement. That court held that the conspiracy was aimed at the gas market and not at employees, and concluded that Mr. Bichan was not the target and therefore did not suffer an antitrust injury. *Bichan v. Chemetron, supra* at 519-520. Whereas the Ninth Circuit found that a terminated employee was especially appropriate to be an antitrust plaintiff (*Ostrofe v. H. S. Crocker, supra* at 1385), the Seventh Circuit at 520 held that Mr. Bichan would not be an effective plaintiff.

The conflict thus presented to this Court for resolution is both specific, i.e., contrary results based on similar facts, and philosophical, i.e., the expansive "enforcement directed" theory of the Ninth Circuit versus the restrictive consumer theory of the Seventh Circuit. This type of conflict is not likely to be resolved by further Circuit Court analysis in future cases. The battle lines have been sharply drawn, and resolution of this conflict at this early stage is needed to give direction in a great number of anticipated cases. The division of Circuit authority has already led to conflicting trial court decisions in *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776, 780 (W.D. Pa. 1982) (court found standing in favor of discharged employee under Section 4) and *Callahan v. Scott Paper Co.*, 541 F. Supp. 550, 561 (E.D. Pa. 1982) (court utilized Third Circuit balancing test, but rejected Section 4 standing for discharged employee and rejected *Ostrofe*).

The issue raised in the two conflicting opinions will undoubtedly arise in the remaining Circuits. The general tort of retaliatory discharge has been the subject of an increasing number of lawsuits. Certain to be included in these suits are cases factually similar to the instant case. Such common law remedies are sometimes

allowed (*Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (1981)) and sometimes rejected (*Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378, 1384 (9th Cir. 1982) (fn. 12)). Only where the tort is recognized will the victim have a potential remedy. Absent the protection of Section 4, enforcement of the antitrust laws where only an employee has knowledge of the antitrust violation will be left to those states recognizing an action for retaliatory discharge. The result will be inconsistent enforcement of a federal statute. In addition, that remedy would generally leave co-conspirators unaffected because of the small likelihood of proving a cause of action against anyone other than the employing corporation.

The emergence of the tort of retaliatory discharge will inevitably lead to forum shopping, unless the Circuit conflict is resolved. This tactic should be discouraged because it would burden those courts recognizing standing. This problem has serious potential, because the presence of multiple defendants will increase one's ability to establish venue in a circuit which allows Section 4 standing.

The decision in *Bichan* also conflicts factually and philosophically with this Court's opinion in *Radovich v. National Football League*, 352 U.S. 445, 454, 77 S. Ct. 390, 395 (1957). This Court there held that the private antitrust litigant has been placed in a "most favorable position" and that the "Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws". The Court then reinstated the antitrust complaint which was based on the allegation that plaintiff was blacklisted from employment as a football player as a consequence of a conspiracy to monopolize interstate commerce. The similar allegations of the instant complaint are equally

well-stated and it should not have been dismissed. The Seventh Circuit rejected the relevance of *Radovich* as precedent (*Bichan v. Chemetron, supra* at 517), while the Ninth Circuit (*Ostrofe v. H.S. Crocker, supra* at 1382) adopted this petitioner's argument and found their case to be indistinguishable from *Radovich*.

Petitioner also suggests that the Seventh Circuit's restrictive application of Section 4 is at odds with the expansive interpretation of standing by this Court in *Blue Shield of Virginia v. McCready*, ... U.S. ....., 102 S. Ct. 2540 (1982). There, plaintiff alleged a Sherman Act violation in that defendants conspired to refuse to reimburse psychologists' treatment charges. The Court affirmed the existence of standing, noting at 2545:

> ". . . the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. (citations omitted). As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

Mr. Bichan is similarly entitled to standing. His recovery would not be duplicative, because his damages are distinct from those of the ultimate product consumers. Denying a job to Mr. Bichan was one of the primary means alleged to have been used to achieve the illegal ends of the conspiracy, analogous to the denial of reimbursement in *Blue Shield*. The holding in *Blue Shield* at 2549 is equally applicable to the instant case:

> The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S., at 489, quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U. S., at 125.

Finally, the instant case satisfies the requirement of *Blue Shield* that the recovery be linked to the pro-competition policy of the antitrust act. Mr. Bichan's continued presence in the industry would in fact have provided the ultimate pro-competition impetus. The effect of Mr. Bichan's presence would not be limited to the placement of a non-conspirator in the industry. His continued employment in the industry would have meant a continuation of his competitive practices. The complaint established that he was in a position as an officer of the corporation to affirmatively promote competitive conduct and that he effectively did so. He protected competition, and he in turn deserves and is entitled to the protection of the Clayton Act. The decision of the Seventh Circuit stripping this vital protection from him should be reviewed by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 25, 1982.

Respectfully submitted,

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